

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

POSTAL RATE AND FEE CHANGES, 2006 )

Docket No. R2006-1

VALPAK DIRECT MARKETING SYSTEMS, INC. AND  
VALPAK DEALERS' ASSOCIATION, INC.  
OPPOSITION TO THE POSTAL SERVICE'S MOTION  
REQUESTING WAIVER OF THE COMMISSION RULES  
WITH RESPECT TO CATEGORY 1, 2, 3 AND 5 LIBRARY REFERENCES  
(June 5, 2006)

Pursuant to Rule 21(b) of the Postal Rate Commission Rules of Practice, 39 C.F.R. § 3001.21(b), and the Commission's Notice and Order No. 1464 (May 5, 2006) herein, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (collectively, "Valpak") hereby submit their opposition to the Postal Service's Motion Requesting Waiver of the Commission Rules with Respect to Category 1,2, 3 and 5 Library References (hereinafter "Postal Service's motion" or "USPS Motion").

Valpak's opposition is general, in that the Postal Service is seeking a general waiver, without indicating in what particulars it has deviated from the requirements of Rule 31 of the Rules of Practice. And its opposition is specific, in that granting the relief requested could be considered by the Postal Service as a preemptive ruling that would authorize the Postal Service to decline to provide witnesses to be orally cross-examined regarding the witness sponsorship and substance of certain library references discussed herein.

**Background**

Rule 31(b)(2) of the Rules of Practice, 39 C.F.R. § 3001.31(b)(2), sets forth the requirements with respect to the designation and filing of documents as library references in

proceedings before the Commission. Rule 31(b)(2)(iv) details the filing procedure with respect to library references, which includes a requirement to file “contemporaneous written notice” at the time the library reference is filed. As expressly set forth in the subparts of Rule 31(b)(2)(iv), the notice must:

- include the reason(s) why the material is being designated as a library reference (subpart (A));
- include the “category” into which the material falls and describe in detail what the material consists of or represents (subpart (B));
- explain in detail how the material relates to the participant’s case or to issues in the proceeding (subpart (C));
- identify authors or others materially contributing to substantive aspects of the preparation or development of the library reference (subpart (D));
- identify the documents or request to which the library reference relates (subpart (E));
- identify other library references or testimony relied upon or referred to in the designated material (subpart F));
- if the library reference is an update or revision to an earlier library reference, so indicate, and identify the predecessor material (subpart G));
- to the extent feasible, identify portions expected to be entered into the record and the expected sponsor (subpart H)).

*See* Rule 31(b)(2)(iv)(A)-(H). The Commission’s rules permit waiver, upon the filing of a motion demonstrating good cause, of “one or more of the provisions relating to library references.” Rule 31(b)(2)(x).

Rule 31 of the Rules of Practice was substantially revised in the late 1990’s following disputes arising in the context of rate cases, including Docket No. R97-1, regarding the practice of filing library references without indicating critical information concerning the

foundation, authorship, or purpose of the documents. Although the Postal Service argued at that time that “the most serious problems associated with library references in Docket No. R97-1 would not recur,” the Commission nevertheless adopted the notice procedure that the Postal Service is seeking to have substantially waived in this case with respect to the Postal Service’s own library references. *See* Order No. 1263, Docket No. RM98-2, at 3.

Current Rule 31 imposed the notice requirements mentioned above precisely because, without such notice, the same kinds of difficulties requiring adoption of the rule could arise in future cases. Further, the Commission wanted to ensure that information would be provided that adequately identified the contents of a library reference and disclosed how it related to an issue or might be used in a case. *See* Order No. 1263, Docket No. RM98-2, at 3. Requiring parties to provide informative notices at the time library references were filed obviously could help obviate later disputes and avoid delays in proceedings, particularly, for example, if a serious problem arose during the course of discovery because it was not clear whose testimony was being relied upon to support a particular position, study, or similar matter.

At the time the Commission was considering adoption of the current rules, the Postal Service took particular issue with the requirement that authors of a library reference be identified. *See* Rule 31(b)(2)(iv)(D). As the Commission noted at the time, the rule does not require a listing of those providing clerical, secretarial, or other administrative assistance in connection with the preparation of the library reference, but rather those who could be considered to stand in the relationship of “author” to the material in question. For example, in the case of a spreadsheet, it might require only the name of the person(s) under whose direction the material was prepared. *See* Order No. 1263, Docket No. RM98-2, at 15.

**The Postal Service's General Request to Dispense with  
the Requirements of Rule 31 Is Unpersuasive on Its Face**

By requesting that the notice requirements be dispensed with regarding all but Class 2 library references, the Postal Service is seeking a general waiver concerning the application of Rule 31 of the Rules of Practice in this docket. Although it has filed “a notice regarding the master list of library references,” it has requested in its motion that “to the extent that it could be argued that its filing does not actually or substantially comply with all of the requirements of Rule 31(b)(2) with respect to any of these library references, that those requirements be waived.” USPS Motion, p. 1.

The Postal Service supports its motion with the argument that the “intended primary purposes of the revisions to Rule 31(b)(2) ... have been met,” that “the complete lack of controversy” regarding library references in “the last case” shows that “all participants were satisfied with how library references were handled in that case,” and that, since the Postal Service is employing the same policies and procedures with respect to library references in this case, “what worked before should work again.” USPS Motion, pp. 1-2. That is a particularly unpersuasive rationale, seemingly implying that (i) the Postal Service did not comply with the requirements of Rule 31 in the “last case,” (ii) no party objected in the “last case,” and (iii) prior noncompliance justifies current noncompliance. The Postal Service provides no citations to the record, and it is not even clear what the “last case” refers to. The Postal Service appears to be calling for a de facto elimination of the Rule 31(b)(2) notice requirements, which appears to be similar to the Postal Service’s argument that has already

been rejected by the Commission at the time the current rule was adopted. *See* Order No. 1263, Docket No.

RM 98-2, at 3. It is submitted that the Postal Service has not made any showing that the requirements of Rule 31(b)(2)(iv) should be waived with respect to the many library references filed by the Postal Service in this docket.

**Granting the Waivers Requested Appears Designed to Allow the Postal Service to Withhold the Identity of the Authors of Critical Documents Being Relied Upon by the Postal Service in this Docket and Could Preclude Their Being Called for Oral Cross-Examination**

Valpak opposes what appears to be a request for a general waiver in this matter, whereby the Postal Service, in advance of any issue arising in connection with its library references, essentially asks the Commission to rule that the Postal Service is not bound in this docket by certain requirements of Rule 31(b)(2)(iv). Indeed, if any noncompliance with Rule 31 requirements by the Postal Service were to impede the litigation of this docket by intervenors, the Postal Service, as a noncomplying party, should be required to suffer the consequences. The Postal Service should not be the beneficiary of an *a priori* ruling based upon the idea advanced by the Postal Service that, since no problems arose in the “last case” with the Postal Service’s library reference policies, those policies and practice should govern this docket and override the requirements of Rule 31(b)(2). Rather than an omnibus waiver, the better approach, Valpak submits, would be to await the raising of an issue regarding the sufficiency of any library reference filed by the Postal Service (or any other party) in this docket. At that point in time, compliance with the Rule 31(b)(2) requirements can be viewed

in context, and the consequences of any non-compliance with those requirements can be determined.

Valpak also opposes the Postal Service's motion insofar as it is based on broad statements attempting to demonstrate why the requirements of Rule 31(b)(2)(iv) should be deemed unnecessary with respect to the entirety of each category. That demonstration is far from persuasive. For example, addressing Category 1 library references, the Postal Service requests a waiver of the portion of Rule 31(b)(2)(iv) that would require a separate notice for each Category 1 library reference (*see* USPS Motion, p. 3), stating that "the types of information that Rule 31(b)(2)(iv) appears to contemplate would be provided in the library reference notice are instead being included within the preface, summary, or introduction of the library reference itself." *Id.*, fn. 2. Insofar as this means that the Postal Service already has furnished all of the necessary information demanded by Rule 31(b)(2)(iv), of course, requiring the Postal Service to repeat that information in the notice as required by the rule might be thought of as redundant. On the other hand, one could ask why the Postal Service does not simply comply with the rule to assist intervenors and the Commission by providing the information in the form required by the rules, rather than in some other form.<sup>1</sup>

However, the Postal Service's library references do not contain all of the information required by Rule 31(b)(2)(iv), and the Postal Service's motion describes only generally how

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<sup>1</sup> Prior to the adoption of the current version of Rule 31(b)(2)(iv), it had been proposed that those who file library references must provide detailed information and related disclosures about the material in both an accompanying motion and in a preface or summary contained in the library reference. The motion requirement was dropped to reduce the burden on the Postal Service. *See* Order No. 1263, Docket No. RM 98-2, at 6. The Postal Service still opposed the notice alternative, but the Commission rejected the Postal Service's position and adopted the current rule, which requires filing of a notice. *See* Order No. 1263, Docket No. RM 98-2, at 13-14.

some of its Category 1 library references are assembled, claiming that the authors could cover an extensive range of individuals, and requests a waiver of the portion of Rule 31(b)(2)(iv) that “might otherwise perhaps require a more extensive discussion of the authors of, or principal contributors to, the Category 1 library references.” USPS Motion, pp. 4-5. Thus — at the virtual outset of the docket, and in the absence of any pending issue or question concerning the authorship of a Category 1 library reference — the Postal Service requests an advance determination, in the form of a “waiver,” that it has adequately disclosed the authorship of its still anonymous library references. Valpak opposes the Postal Service’s motion in that regard, and submits that the determination of sufficient disclosure of authorship and appropriate witnesses to address issues concerning library references must await further developments in this docket.

As a practical matter, of course, there are some data compilations and other documents whose authorship would be difficult to pin down or isolate to one, or even a few, individuals. But that is nothing new; that difficulty exists in every omnibus rate case. Indeed, the Commission already addressed that issue, as well as the Postal Service’s argument about not having to name authors, when it adopted the current version of Rule 31(b)(2)(iv). In fact, the Postal Service advanced an argument at that time, similar to its argument now, that its duty to name the authors of certain documents should be limited. The Commission obviously appreciated the Postal Service’s point that not all persons involved in the preparation of documents could be identified as authors of a library reference, and said that it expected “filing participants and reviewers to exercise good judgment in complying with this requirement.”

*See* Order No. 1263, Docket No. RM 98-2, at 15.

**USPS-LR-L-77.** One deleterious effect of the Postal Service's approach, if it were permitted wholesale to escape compliance with Rule 31(b)(2)(iv)'s requirements, would be to stymie intervenors and other parties seeking to find out information concerning the foundation for statements or statistics in certain documents, or even the meaning of certain documents. This is a potential problem with respect to library references in the present docket, such as "Billing Determinants, Fiscal Year 2005" (USPS-LR-L-77), which the Postal Service has denominated a Category 1 Library Reference, providing "specific information regarding revenue and volume of postal products and services." Valpak is in the process of formulating important questions about billing determinants, and should not be required to settle for institutional responses, losing the right to conduct oral cross-examination. The Postal Service cannot be orally cross-examined as an institution, and without a Commission Order, the only Postal Service witnesses that can be orally cross-examined are those filing testimony.

Although the Postal Service seems to claim that its current library reference practice has been working adequately, Valpak ran into at least one instance in Docket No. R2005-1 where knowledge about the authorship of the billing determinants library reference could have led to important information and made for a better record. Postal Service witness Pafford (USPS-T-4) testified regarding the Postal Service's revenue, piece and weight system and was asked a number of questions related to the Postal Service's billing determinants library reference in that docket, all to no avail. Not only was he not familiar with billing determinants, he did not know who prepared the billing determinants report. *See* Tr. 7/2557-2561, Docket No. 2005-1. In Docket No. 2005-1, as with USPS-LR-L-77 in this docket, the Postal Service, by not disclosing certain information concerning preparation of the billing

determinants report, and by not connecting that library reference with other documents and testimonies in the case that rely on the billing determinants report, effectively shields itself from inquiry about the source of those determinants. Those are matters that would not be easy to do if the Postal Service were to comply strictly with the requirements of Rule 31(b)(2)(iv). Issues regarding the billing determinants are likely to again arise in this docket.

Significantly, USPS-LR-L-77 is a unique document containing data compiled expressly for use in this docket: it has not evolved over several years, *see below*. It is not even clear that this should be a Category One reference as it is not a product of any data system. Given the increasing complexity and refinement of the rate structures (e.g., “heavy-weight” standard letters weighing between 3.3 and 3.5 ounces) it is not clear where details concerning such mail can be found in this library reference which purports to be a comprehensive collection of data.

**USPS-LR-L-1.** Further, already in this docket, the problems of the Postal Service’s waiver strategy are already being seen. Valpak asked Postal Service witness Davis certain questions (VP/USPS-T47-1) concerning Appendices H and I to USPS-LR-L-1, Summary Description of USPS Development of Costs by Segments and Components, Fiscal Year 2005, which witness Davis had relied upon in his testimony. The Postal Service redirected those questions to the Postal Service institutionally. Those questions included the authorship of that library reference relied on by witness Davis, as well as the identity of witnesses who would be sponsoring that library reference in evidence. The Postal Service responded that, given the nature of the USPS-LR-L-1 as a Category 1 library reference which was continually evolving over many years, with input from a wide variety of sources, identification of specific authors was “untenable” and there would be no witnesses that will be sponsoring the materials. *See*

USPS response to VP/USPS-T47-1(a) and (c).<sup>2</sup> The Postal Service made no effort to address Appendices H and I, the only portions of USPS-LR-L-1 addressed by Valpak's interrogatories. In the context of this one illustration of the problem, if granting the Postal Service's motion for waiver would somehow preclude Valpak from later requesting the Commission to order the Postal Service to provide a witness to be orally cross-examined, then the Postal Service's motion for waiver must be denied.

### **Conclusion**

The Postal Service's effort to avoid following the requirements of Rule 31(b)(2)(iv) would restrict intervenors from discovering important information, and conducting oral cross examination of Postal Service witnesses with actual knowledge of certain library references being relied on by the Postal Service. Valpak believes that the Postal Service should follow substantially the Rule 31(b)(2)(iv) notice requirements, and that any waiver sought herein — other than a waiver with respect to form — should not be granted, at least at this stage of the proceeding. If an issue arises during the litigation of this docket concerning the sufficiency of the Postal Service's compliance with Rule 31(b)(2)(iv), the matter can be determined at that time.

Respectfully submitted,

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<sup>2</sup> Although the Postal Service responded that the information in Appendices H and I would not be relied upon by any witnesses, response to VP/USPS-T47-1(d), the meaning ascribed to attributable costs and incremental costs by the Postal Service undergirds the entirety of the Postal Service's filing in this docket.

William J. Olson  
John S. Miles  
Jeremiah L. Morgan  
WILLIAM J. OLSON, P.C.  
8180 Greensboro Drive, Suite 1070  
McLean, Virginia 22102-3860  
(703) 356-5070

Counsel for:  
Valpak Direct Marketing Systems, Inc. and  
Valpak Dealers' Association, Inc.